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No. 02-572

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

INTEL CORPORATION,

*Petitioner*,

v.

ADVANCED MICRO DEVICES, INC.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

This case presents two distinct circuit conflicts on issues of such international significance that the European Commission itself has taken the extraordinary step of urging this Court to grant certiorari. Nothing in AMD's opposition provides a basis for denying that request and this petition.

As an initial matter, AMD seeks in vain to deny the existence of these two conflicts. AMD tries to explain away the multi-circuit conflict on the first question presented by reasoning that an intervening decision of the Third Circuit somehow frees appellate panels and district courts in the First and Eleventh Circuits to ignore their own circuit precedent. But that argument falters because the Third Circuit is not this Court, and its decision to oppose the First and Eleventh Circuits only deepens the existing conflict. AMD's effort to deny the other conflict, on the second question presented, illogically presupposes that a 1996 statutory amendment that cuts *against* the Ninth Circuit's position might induce the Second Circuit to *join* that position, even though the Second Circuit reaffirmed its own contrary position just last year.

AMD stands on no firmer ground when it claims that the EC asks the Court to grant certiorari only because it "misunderstand[s]" this case. Opp. 13. To the contrary, the EC understands this case perfectly. "It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions[.]" *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 542 (1987). By endorsing American-style discovery under section 1782 without regard to "admissibility in the foreign tribunal" (Pet. App. 8a), the decision below creates so much concern about the U.S. discovery consequences of informal interaction with foreign antitrust authorities that it discourages any well-counseled U.S. com-

pany from volunteering its cooperation with the EC. *See* Br. of EC as Amicus Curiae ("EC Br.") 6-8.[1]

Finally, there is no merit to AMD's claim that certiorari should be denied because the decision below is "interlocutory." This Court routinely grants certiorari, despite the formally interlocutory character of a case, "where the opinion of the court below has decided an important issue, otherwise worthy of review," and particularly where the case presents "a conflict on a question of law with another court of appeals." Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* 260 (8th ed. 2002). Nothing the district court could do on remand would sharpen the Court's understanding of the purely legal threshold issues presented here. Indeed, for a variety of reasons, this petition may give the Court its best opportunity for many years to resolve these long-standing disagreements about the threshold requirements of section 1782.

## ARGUMENT

### I. The Circuit Conflicts Implicated By The Decision Below Are Live, Entrenched, And Squarely Presented.

This case presents two circuit conflicts about core interpretive issues arising under section 1782. First, because the

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[1] *See* Br. Amicus Curiae of the Nat'l Ass'n of Manuf. 7 ("It is one thing for . . . American companies to be subject to the jurisdiction, laws and regulatory procedures of the foreign nations in which they do business. It is quite another to subject these companies to onerous American-style discovery sought by their direct competitors—both foreign and domestic—when that discovery is unauthorized by the foreign country whose laws the competitor invokes and when the competitor is not a party to any pending or even imminent adjudicatory proceeding in a foreign country."); Br. Amicus Curiae of the Chamber of Commerce of the U.S. 15 ("'[I]t is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired.'") (quoting Molly W. Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U.L. REV. 591, 619 (2001)).

very purpose of section 1782 is to facilitate international comity by "assist[ing] foreign and international tribunals," the First and Eleventh Circuits have held that private parties may obtain discovery under section 1782 only where they can "show that the information sought in the United States would be discoverable under foreign law." *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2, 7 (1st Cir. 1992); *see* Pet. 8-10 (citing cases). The Second, Third, and Ninth Circuits reject any such requirement. *See id.* The Second and Ninth Circuits separately disagree on whether section 1782 discovery is limited to circumstances in which quasi-adjudicatory foreign proceedings are either pending or at least "imminent—very likely to occur and very soon to occur." *In re Application of Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (internal quotation marks omitted); *see* Pet. 13-14.

a. As an initial matter, AMD's brief in opposition confirms that this case squarely presents each of those conflicts. As to the first, AMD does not deny, and the decision below confirms (*see* Pet. App. 7a-8a), that AMD would be unable to obtain under EC law the very discovery that it seeks here. AMD thus acknowledges that this case presents an opportunity to resolve the conflict on the first question presented; the only question AMD raises is whether such a conflict is "intolerable" enough to warrant review. Opp. 28.[2]

As to the conflict on the second question ("imminence"), AMD does not deny that the first-stage investigation now underway is non-adjudicatory. It thus accepts the premise of the decision below (*see* Pet. App. 6a) that such an investiga-

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[2] AMD does argue that, because no documents have yet been produced, it is too early to tell whether the EC "would value the documents" that AMD seeks. Opp. 27-28. But that is irrelevant: the conflict on the first question presented relates to whether the foreign authority permits private parties to obtain the discovery, not whether it might itself be interested in seeing the documents. In any event, the EC confirms that it does not in fact "consider it necessary to request or even subsequently to review the documents" that AMD seeks here. EC Br. 4

tion cannot qualify as a "proceeding" that itself triggers section 1782 discovery rights. *E.g.*, Opp. 17 ("discovery is allowable under § 1782 during the investigative stage of a proceeding only if the investigation is connected to a likely adjudicative proceeding"). Although AMD appears to disagree with both Intel and the EC itself about the proper characterization of any *second*-stage EC investigation,[3] it does not deny that the current "*preliminary* investigation . . . is almost certain to remain open until the second half of 2003 *at the earliest*." Pet. 7 n.3 (emphasis added, internal quotation marks omitted). Thus, AMD does not dispute any of the facts that led the Ninth Circuit to accept, for purposes of its analysis, that no "proceedings" are "imminent" in the foreign jurisdiction. *See* Pet. App. 6a. There is thus no genuine dispute that discovery would have been foreclosed if this case had arisen in the Second Circuit.[4]

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[3] Although immaterial to this Court's certiorari decision, AMD's description of second-phase EC investigations (Opp. 5) is misleading. It is undisputed that the EC does not view such investigations as adversarial, that no rules of evidence apply, and that no provision is made for taking testimony under oath, for compelling testimony, or for conducting witness cross-examination. *See* Pet. 15-16. Indeed, the complainant has no right to any hearing unless the subject of the investigation asks for one. *See* 3 E.R. 501. And the "independent person" brought in to address procedural issues does not arbitrate substantive disputes (*see* 3 E.R. 501-02), despite AMD's unsupported claim to the contrary (Opp. 5 n.2). As the EC explains, it "*never* adjudicates disputes between parties," whether in a first-stage or a second-stage investigation; "[t]he parties to a complaint cannot be considered 'litigants' before a 'tribunal'"; and "a complainant ultimately is only a person reporting an alleged violation of the law to a public authority." EC Br. 4-5.

[4] AMD does suggest that the prospect of an eventual quasi-judicial proceeding here is no more speculative than the prospect of the foreign criminal proceeding at issue in *In re Erato*, 2 F.3d 11 (2d Cir. 1993), in which discovery was permitted. But the Second Circuit had no occasion in that case to apply the imminence requirement, because the foreign government sought the discovery under the terms of a treaty that "supersede[d]" section 1782, such that "existing law under section 1782 d[id]

b. AMD nonetheless claims that, even though this case may present them, these acknowledged circuit conflicts are not "intolerable" enough (Opp. 23, 28) to warrant this Court's review. As to each conflict, that claim is wrong.

First, as the Ninth Circuit recognized, *see* Pet. App. 7a-8a; *see also Four Pillars Enters. Co.* v. *Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002), circuit precedent in the First and Eleventh Circuits would preclude private party discovery of these materials for the simple reason that the foreign authority on whose behalf AMD ostensibly seeks them does not even authorize such discovery. Those courts adopted that position because they independently determined that it best effectuates the statutory purpose—not, as AMD contends, because they were somehow bound to follow the Third Circuit's reasoning in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985). For example, the First Circuit, which cited *John Deere* only in passing, surveyed the "history, rationale, and the policy considerations" of section 1782 before concluding that a section 1782 applicant must "make a showing that the information is discoverable under foreign law." *In re Application of Asta Medica S.A.*, 981 F.2d 1, 6-7 (1st Cir. 1992). Because the Third Circuit is not this Court, its subsequent decision to join the other side of this entrenched multi-circuit conflict, *see In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998), does not somehow negate binding circuit precedent in the First and Eleventh Circuits.[5]

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not control this case." *Id.* at 15. AMD's suggestion that the Second Circuit has thereby "understood its requirement as *allowing* discovery during an investigative stage" (Opp. 2) is thus false.

[5] AMD claims that the passage addressing this issue in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988), is "dictum." Opp. 29. That is both mistaken and irrelevant. First, the *Trinidad* court's treatment of this issue is precedential, because it adopted the discoverability requirement as circuit law and applied it to the facts of the case. *See* 848 F.2d at 1156. Even if that were not so, the Eleventh Circuit's subsequent reaffirmation

AMD fares no better in arguing that a 1996 amendment to section 1782 draws into question the conflict between the Second and Ninth Circuits on the second question presented ("imminence"). By adding the final clause to the first sentence of section 1782(a), the 1996 amendment authorized the district courts to include "criminal investigations conducted before formal accusation" within the scope of the foreign matters that can trigger discovery rights under section 1782. To the extent that amendment is relevant at all to the second question presented, it cuts in favor of the Second Circuit's position and against the Ninth's. The new clause added by the 1996 amendment would be surplusage if, as AMD argues, courts already had plenary authority before 1996 to order section 1782 discovery in the absence of a pending or imminent foreign proceeding. Because Congress is presumed not to have wasted its breath, the addition of this new clause, confined to *criminal* investigations, confirms that no such discovery is appropriate in the *civil* context.[6] In all

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of the same position in *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988), plainly was necessary to the court's holding in that case (*see* Opp. 29 n.16), and it thus *independently* serves as circuit precedent. *See also United Kingdom* v. *United States*, 238 F.3d 1312, 1319 (11th Cir.), *cert. denied sub nom. Raji* v. *United States*, 122 S. Ct. 206 (2001).

[6] AMD is likewise wrong on the merits to dismiss the Eleventh Circuit's view that "a private individual may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" entitled to section 1782 discovery. *Trinidad*, 848 F.2d at 1155-56 (emphasis added); *see* Opp. 15. AMD's own merits position not only drains the 1996 amendment of significance, but conflicts with Congress's decision, in a parallel provision, to authorize *pre-litigation* discovery in aid of foreign antitrust investigations *only* "[o]n the application of the Attorney General." 15 U.S.C. § 6203(a); *see* Pet. 13. AMD's position also focuses artificially on the deletion of one word ("pending") amid a broader rephrasing of section 1782 in 1964. The "contemporaneous record" (Opp. 21) that AMD cites in attaching substantive significance to that deletion is not legislative history, but a law review article (*see* Opp. 7-8). Finally, the Eleventh Circuit's distinction between private civil litigants and foreign

events, nothing in the 1996 amendment could prompt the Second Circuit to *renounce* its position and join ranks with the Ninth. In fact, since 1996, the Second Circuit has repeatedly reaffirmed the vitality of its "imminence" requirement. *E.g., Ishihara*, 251 F.3d at 125, 127 n.4; *see United States* v. *Sealed 1*, 235 F.3d 1200, 1205 n.2 (9th Cir. 2000).

Each of these circuit conflicts will persist until this Court intervenes. Ordinarily, one such conflict would suffice for certiorari; this case presents two. Moreover, unlike the typical circuit conflict, which involves issues of purely domestic significance, each of these conflicts projects a chaotic picture of U.S. law not just to American litigants, but to the foreign governments whose regulatory interests are often at stake.

## II. The European Commission's Concerns About The Decision Below Are Compelling.

It is rare for any foreign governmental authority to appear as an amicus to urge this Court to grant a petition for certiorari. That the EC would do so here, representing many of this Nation's closest strategic and trading partners, speaks volumes about the international significance of the questions presented. As the EC observes, the Ninth Circuit's decision "fundamentally misconstrues the nature of the European Commission," which "functions primarily as a law enforcement agency in the antitrust field" and "does *not* adjudicate the rights of parties, as a tribunal would do"; it "may undermine" cooperation in the EC's Leniency Program; and it "risks interfering with the normal conduct of international cooperation between the Commission services and United States antitrust authorities." EC Br. 3-5.

AMD contends that the EC's concern about the threat to the Leniency Program "follows from a simple misunderstanding of this case and the decision below." Opp. 13. Any

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criminal authorities is sensible: pre-litigation discovery is the norm in the criminal context, but is virtually non-existent in the civil context.

misunderstanding, however, is AMD's. The decisions of companies to participate in the Leniency Program—under which they "submit information regarding existing cartels of which they have knowledge in exchange for leniency from the Commission with respect to their own wrongdoing" (EC Br. 6)—are often difficult and close. The Ninth Circuit's decision will undeniably affect the antitrust advice that multinational companies receive about the benefits and risks of participating in that program. Whether or not the scope of *AMD's* discovery request includes Leniency Program documents (*see* Opp. 13), the Ninth Circuit's embrace of "liberal discovery" under section 1782 (Pet. App. 8a), and its rejection of any limitation "regarding admissibility in the foreign tribunal" (*id.*), will be cited by the likes of AMD to permit discovery in this country of any competitor's submissions to the EC. Revealingly, AMD does not claim otherwise.

Moreover, to companies contemplating the near-term consequences of participation in the Leniency Program, it will come as small comfort that this Court might eventually exercise its discretionary certiorari jurisdiction to "review . . . at the appropriate time" a "fail[ure] to protect Leniency Program confidentiality." Opp. 14. The EC's support for certiorari now, rather than five or ten years from now, reflects its valid concern that the decision below will immediately erode the private incentives needed to sustain key components of the EC's competition regime.[7]

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[7] AMD claims that it "takes the EC's position in this case very seriously, and would not be proceeding if the EC expressed any objection to the procedure AMD has invoked to obtain evidence to support its case against Intel[.]" Opp. 13. This claim is perplexing, given that the EC has filed an amicus brief in this Court making precisely such an "objection." AMD's disregard for the concerns of the foreign authority on whose behalf it is ostensibly seeking this discovery makes sense only if AMD has as much of an interest in procuring that discovery for its own sake as in persuading the EC to take action on its complaint. Also, despite AMD's contrary suggestion (Opp. 10), Intel filed a conditional cross-application

## III. The Interlocutory Nature Of The Decision Below Presents No Obstacle To This Court's Review.

There is also no merit to AMD's argument that certiorari is somehow inappropriate because the decision below is "interlocutory." This Court commonly exercises its certiorari jurisdiction to review interlocutory decisions in federal non-criminal cases "where the opinion of the court below has decided an important issue, otherwise worthy of review"—particularly where, as here, the case presents "a conflict on a question of law with another court of appeals."[8]

The real question is whether the procedural posture of a case would somehow impair this Court's review of the legal questions presented. Here the answer is no. This case presents two pure disputes of statutory interpretation whose resolution depends not on the particulars of the documents, but on the text, purposes, and history of section 1782. AMD spends several pages purporting to argue otherwise (Opp. 10-14), but produces nothing beyond nebulous generalities about the virtues of awaiting more facts and "further percolation" (Opp. 3). At bottom, this argument against certiorari makes no more sense than the untenable position that this Court should deny review of all "interlocutory" court of appeals decisions resolving threshold questions (such as jurisdiction) before remanding for further proceedings on the merits.

Moreover, there is good reason to grant certiorari now rather than at some indefinite point in the future. The precedential consequences of the Ninth Circuit's decision affect not just these particular parties, but all U.S. companies that

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for section 1782 discovery not because it is hypocritical, but because it wishes to preserve its rights in the event that AMD's position ultimately prevails, and Intel so emphasized in its *conditional* pleading.

[8] Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* 260 (8th ed. 2002) (citing, *inter alia*, *Central Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)).

do business in the EC, as the EC itself emphasizes in its brief. Nothing that the district court could do on remand would alleviate these larger concerns about the impact of the Ninth Circuit's decision on the way that private companies deal with the EC and other foreign authorities.

Finally, the decision below may present the optimal procedural vehicle for this Court's review of the questions presented here precisely *because of* its interlocutory character. If this petition is granted in the normal course, the Court could resolve each of those questions on the merits this Term, before there could be any material change in the status of the current EC investigation. *See* p. 4, *supra*. If, on the other hand, this Court were to defer review indefinitely, until the conclusion of remand proceedings in the district court and court of appeals, there is no guarantee that the case would ever reach the Court again. *Cf. Church of Scientology* v. *United States*, 506 U.S. 9 (1992) (compliance with documentary summons enforcement order did not moot appeal). Moreover, there is no reason to believe that any similar case that eventually reaches this Court in the form of a "final order" will present, as cleanly as this case does, two different circuit conflicts on the core meaning of section 1782. Deferring this Court's review into the indefinite future might well suit AMD's interests, but it would disserve the larger public interest in creating a coherent body of U.S. law on these internationally significant issues.[9]

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] As AMD notes, the district court has scheduled an initial hearing for January 10 to address the specifics of AMD's document requests. The court has ordered AMD to amend its existing section 1782 application to make it less "overbroad" (Opp. App. 5a-6a), much as a party might need to amend its complaint in an ordinary civil suit. AMD does not and could not argue that this procedural order presents any threshold obstacle to this Court's review of the underlying legal issues.

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